SUPREME COURT, U. S.
AUG 14 1975
MICHAEL RODAK, JR., CLERK

No. 75-237

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

JAMES L. COBB,

Petitioner,

vs.

UNITED STATES OF AMERICA

and

CHARLES T. REHLING, SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES L. COBB
211 E. 4th Street
Covington, Kentucky 41011

WILLIAM C. OLDFIELD
211 E. 4th Street
Covington, Kentucky 41011

Counsel for Petitioner

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

INDEX

	Page
Opinion Below	1
Jurisdictional Statement	2
Questions Presented for Review	2
Constitutional Provisions	2
Statement of Facts	2
Reasons for Granting Writ	5
Argument	5
Conclusion	13
Appendix A — Constitutional Provisions	1a
Appendix B — Opinion Below	2a
Appendix C — District Court Opinion	7a
Appendix D — Original Complaint	11a

TABLE OF CITATIONS

Bellis v. U.S., 40 L.E. 2d 678	5
Boyd v. U.S., 116 U.S. 616 (1886)	5
Gilbert v. California, 384 U.S. 757 (1965)	5
Hubner v. Tucker, 245 F. 2d 35 (9th Cir., 1957)	8
In re: Subpoena Duces Tecum, 81 F.Supp. 418, 421 (ND Cal., 1948)	6
Jones v. Securities & Exchange Commission, 298 U.S. 1, 27 (1936)	7-8
Smith v. Kelly, et al., 465 SW2d 39 (1971)	11

Page

U.S. v. Detroit Vital Foods, 407 F. 2d 570 (6th Cir., 1969) 6

U.S. v. Kleckner, 273 F.Supp. 251 (1967), Appeal Dismissed, 6th Cir., 382 F. 2d 1022 6

U.S. v. O'Connor, 118 F.Supp. 248, 250, (D.Mass. 1953) 7

U.S. v. Parrott, 248 F.Supp. 196, 202, (D.D.C. 1965) (SEC Case) 6

U.S. v. Slutsky, 352 F.Supp. 1105 (SDNY, 1972) .. 6

Other Authorities:

I. R. C. § 7602, et seq. 7

KRS 362.180 9

KRS 362.180 (2) 9, 10

KRS 362.180 (3) 9, 10, 11

KRS 362.180 (4) 9, 11

Constitutional Provisions

Fourth Amendment 1a

Fifth Amendment 1a

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. ————

JAMES L. COBB,

Petitioner,

vs.

UNITED STATES OF AMERICA

and

CHARLES T. REHLING, SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

James L. Cobb, your Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above case on May 16, 1975.

OPINION BELOW

The decision of the Sixth Circuit Court below is reported as Appendix B and the District Court Memorandum and Order are reproduced as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254.

QUESTIONS PRESENTED

I. MAY THE PETITIONER ASSERT AS "PRIVILEGED" THE FINANCIAL RECORDS OF HIS LAW PRACTICE?

II. IS THE USE OF A "SUMMONS" ISSUED TO PETITIONER BY A SPECIAL AGENT OF THE IRS ENGAGED IN GATHERING EVIDENCE FOR A POSSIBLE CRIMINAL ACTION AGAINST PETITIONER AN UNWARRANTED INTRUSION ON THE PETITIONER UNDER THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION?

III. DOES THE FILING OF IRS FORM 1065 BY ATTORNEYS ASSOCIATED TOGETHER IN THE PRACTICE OF LAW, PRECLUDE THEIR INDIVIDUAL CLAIM OF PRIVILEGE?

APPLICABLE CONSTITUTIONAL PROVISIONS

These are set forth in Appendix A.

STATEMENT OF FACTS

The Petitioner practices law in Covington, Kentucky, and the Respondent, a Special Agent with the Internal Revenue Service, has undertaken an investigation of the Petitioner's personal income tax returns for the Calendar Year 1971 and 1972.

During the Calendar year 1971, the Petitioner practiced law in association with one Peter F. Beasley (now de-

ceased). During the Calendar Year 1972, the Petitioner practiced law in association with Peter F. Beasley and William C. Oldfield.

Internal Revenue Service Informational Forms 1065 were filed for each of the years under investigation as well as Petitioner's individual Form 1040. No written or formalized partnership agreement existed between Peter F. Beasley in the year 1971, nor does a written formalized agreement exist for the year 1972. Moreover, there existed no formal detailed agreement or understanding between the parties concerning the division of net revenues or payment of expenses. The procedure, best described as informal, was that receipts were deposited in a common account upon which checks were written to pay the office expenses, including the disbursement of monies to clients.

In 1971, whenever Mr. Beasley or Petitioner needed funds for their personal expenses, they would write themselves a check for whatever amount was needed, assuming that sufficient funds existed to cover their needs. During the year 1971, there was no attempt by either Mr. Beasley or Petitioner to regulate the amount of money withdrawn, nor were either of them required, or limited, to drawing any certain amount per week or per month. Moreover, a check of the 1971 joint account of Peter F. Beasley and Petitioner shows that one party withdrew $1,100.00 more than the other party and one party wrote sixty-six drawing checks while the other party wrote just twenty.

The procedure followed for the year 1972 was substantially the same as for the year 1971, with the exception that three parties were now involved — Peter F. Beasley, William C. Oldfield, and the Petitioner. The joint account for the year 1972 reveals a $500.00 difference between two of the parties and approximately a $3,200.00

and $2,700.00 difference between the third party and the first and second parties, respectively.

Respondent, Charles T. Rehling, a Special Agent of the Internal Revenue Service, accompanied by another agent, came to the Petitioner's office in Covington, Kentucky, and advised the Petitioner that they were investigating the Petitioner's income tax returns for 1971 and 1972.

Respondent then proceeded to read Petitioner his constitutional rights and finished by saying, "You, of course, don't have to talk to me at all."

Thereafter, Special Agent Rehling asked for all of Petitioner's records for 1971 and 1972. Petitioner refused this request and subsequently a Summons was issued by Respondent commanding that all of the records used in the preparation of the tax returns (Form 1065) for 1971 and 1972 be produced to the Respondent, including the General Ledger; Cash Receipts Journal; Cash Disbursements Journal; Expense Journal; Cancelled Checks; Bank Statements; Work Papers; Summaries; and Trial Balances. Petitioner refused and a Petition to enforce the Internal Revenue Summons was filed in the District Court.

The Petitioner, James L. Cobb, raised as a defense to enforceability of the Summons that he is entitled to assert his constitutional protection and privilege against divulging the information which is sought by the Respondent and that the Summons is an unwarranted intrusion protected by the Fourth Amendment to the United States Constitution.

After a brief hearing, the Lower Court granted the relief sought by the Petition.

REASONS FOR GRANTING THE WRIT

The District Court and the Sixth Circuit Court of Appeals have misapplied the holding in *Bellis* v. *United States,* 40 L.ed2d 678, so as to negate any and all privilege that Petitioner may have in his private records or those of his clients and by allowing an IRS Agent to use a Summons compelling the Petitioner to give up his records when no probable cause exists to believe that a crime has been committed, violates the provisions of the Fourth and Fifth Amendments to the United States Constitution.

ARGUMENT AND LAW

In the case relied upon by Respondent and by the Lower Court in the issuance of the Order appealed from, *Bellis* v. *United States,* 40 L.ed2d 678, it is to be noted that the *Bellis* case was the enforcement of a Subpoena from a Grand Jury and not the administrative issuance of a Summons by a Special Agent of the Internal Revenue Service, hence, the Petitioner submits that the case at bar is readily distinguishable from *Bellis.*

I. THE PETITIONER ASSERTS AS "PRIVILEGED" THE FINANCIAL RECORDS OF HIS LAW PRACTICE.

Further, the Petitioner contends that the privilege against self-incrimination apply not only to oral testimony but to communications in documentary form as well. See *Boyd* v. *United States,* 116 U.S. 616 (1886); and *Gilbert* v. *California,* 384 U.S. 757 (1965). The Court reiterated that the Fifth Amendment protects all testimony or communicative evidence, including books and records. There is an inherent unfairness in co-mingling of civil and crim-

inal proceedings which should be constitutionally protected. See *U. S.* v. *Parrott,* 248 F.Supp. 196, 202 (D.D.C. 1965) (SEC Case); see also *U. S.* v. *Detroit Vital Foods,* 407 F.2d 570 (6th Cir., 1969).

It is important to note that the *Bellis* case preserves the privilege by citing at the end of said Opinion, *U.S.* v. *Slutsky,* 352 F.Supp. 1105 (SDNY, 1972); In re Subpoena Duces Tecum, 81 F.Supp. 418, 421 (ND Cal, 1948).

Petitioner cites in support of his position that the law is set out in *U.S.* v. *Kleckner,* 273 F.Supp. 251 (1967), wherein the Court upon a similar Petition to enforce an Internal Revenue Summons, the District Court, Weinman, C. J., held that in view of the fact that the taxpayer's returns had been assigned to a Special Agent of the Intelligence Division, the purpose of Subpoenaes addressed to taxpayer was not to obtain financial records relevant to a civil proceeding for the collection of income tax, but rather it was to obtain information for the filing of a criminal action, and taxpayer would not be required to produce the papers sought because of the privilege against self-incrimination. Enforcement denied. Appeal dismissed, 6th Cir., *382 F.2d 1022.*

In the instant case, a hearing was held before the Court on August 15, 1974, and the Court's attention is directed to Page 31a of the Appendix and Transcript of said proceedings wherein the question was asked of Special Agent Rehling, Respondent herein:

> "Q. And if I do this, you would use that information in a criminal action if you thought you deemed it advisable, would you not?
> A. Yes sir."

Clearly indicating that Special Agent Rehling is making a criminal investigation and would, in fact, use the informa-

tion which he seeks to compel Petitioner to produce evidence against himself.

II. THE USE OF A "SUMMONS" ISSUED TO THE TAXPAYER-PETITIONER BY RESPONDENT, A SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE ENGAGED IN GATHERING EVIDENCE FOR A CRIMINAL PROSECUTION, IS AN UNWARRANTED INTRUSION ON THE PETITIONER UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION.

In the case at bar, the use of an administrative Summons to investigate and gather evidence for a criminal prosecution against the Petitioner violates the protection afforded the Petitioner by the Fourth Amendment to the United States Constitution in that same constitutes an unreasonable search and intrusion into the Petitioner's personal and private affairs and papers.

It is the contention and argument of the Petitioner that the language of the Internal Revenue Code authorizing the compulsory production of records is directed solely to the determination and collection of civil tax liabilities (See I. R. C. § 7602, et. seq.). Nothing in the Internal Revenue Code sanctions the issuance of a Summons in aid of a criminal investigation. See *U. S.* v. *O'Connor,* 118 F.Supp. 248, 250 (D.Mass., 1953). Nor does the Code confer any general investigatory power from which the necessary authorization could be implied. In preparing a criminal prosecution, the Grand Jury is the only appropriate medium for the preliminary investigation of crime. See *Jones* v. *Securities & Exchange Commission,* 298 U.S.

1, 27 (1936); See also *Hubner* v. *Tucker,* 245 F.2d 35 (9th Cir. 1957).

III. DOES THE FILING OF IRS FORM 1065 BY ATTORNEYS ASSOCIATED TOGETHER IN THE PRACTICE OF LAW PRECLUDE THEIR INDIVIDUAL CLAIM OF PRIVILEGE?

Although it is quite evident that the Respondent has proceeded on the assumption that a partnership existed for the year 1971 and 1972, it is to be noted that upon reading the original Petition, at no point in the Petition filed by Respondent does the Respondent allege the existence of a partnership and since the allegations of the Petition are denied by the Petitioner's Answer, it is the position of the Petitioner that the pleadings joined at issue fail to state a cause of action against this Petitioner upon which relief should have been granted to the Respondent.

Second, it is the position of the Petitioner that no partnership such as found in *Bellis* existed (*Bellis* was formal and written), hence, the Petitioner is within his constitutional right in asserting that he does not have to bear witness against himself by furnishing his personal records to a Special Agent of the Internal Revenue Service who is admittedly making a criminal investigation. This is especially true as to the year 1971, since even if the Court found that a partnership did exist between Mr. Beasley and Mr. Cobb, Mr. Beasley being now deceased, Mr. Cobb is the only surviving member of said alleged partnership and has sole possession, custody and control of all records pertaining to 1971.

Third, Petitioner now finds that the law office association that he shares may not, in fact, meet the definition of a

partnership under Kentucky law, whereas, the Court in effect found that *Bellis* did, in fact, meet all of the specifications of a partnership under Pennsylvania law. Despite the fact that a partnership return (Form 1065) was filed for both years, perhaps a closer look at the facts and law reveal a different situation.

Section 362.180 of the Kentucky Revised Statute sets forth the rules for determining the existence of a partnership within the Commonwealth of Kentucky. The relevant provisions of *362.180(2); 362.180(3);* and *362.180 (4)* are as follows:

> *K.R.S. 362.180(2)* Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property;
>
> *KRS. 362.180(3)* The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived;
>
> *KRS 362.180(4)* The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
>
> (a) As a debt by instalments or otherwise;
>
> (b) As wages of an employe or rent to a landlord;
>
> (c) As an annuity to a widow or representative of deceased partner;
>
> (d) As interest on a loan, though the amount of payment vary with the profits of the business;

(e) As the consideration for the sale of a good will of a business or other property by instalments or otherwise.

As can clearly be seen from the language of *KRS. 362.180(2)*, the mere joint ownership of any property (including a bank account) ". . . does not of itself establish a partnership . . ." As a point of fact, all office furniture and equipment used during the years 1971 and 1972 were acquired prior to Mr. Beasley's entrance into the practice of law with the Appellant. Moreover, the majority of the law library was acquired by the Appellant prior to Mr. Beasley's and, of course, Mr. Oldfield's entrance into the practice of law with the Appellant.

Section 362.180(3) provides that the mere *sharing* of gross returns does not a partnership make. As can be clearly seen from the facts set out above, there was a *sharing* of gross receipts in that they were deposited in a joint account and a *sharing* of expenses. However, again it should be noted as a point of fact that many of the expenses in the years in question, i.e., rent, telephone, electric, equipment maintenance, and library expenses, were billed to Appellant personally and did not include the name of Peter F. Beasley and/or Peter F. Beasley and William C. Oldfield and Appellant can only assume that should payment not have been forthcoming on these accounts, that he, and he alone, would have been the target of any collection efforts by these creditors.

In addition to these factors concerning rent, telephone and other related office expenses, it should be noted that neither Mr. Beasley nor Mr. Oldfield was required to pay any sum upon their entering the practice of law with Appellant or to compensate Appellant for these assets owned entirely by Appellant for, in some cases, a substantial

period of time. Likewise, fees collected after these gentlemen entered the practice, but as a result of cases obtained by Appellant prior to their entering the practice, were placed in the common account subject to the "draws" of anyone.

Subsection (4) of KRS. 362.180 provides that receipt of a share of the profits of a business is prima facie evidence of the existence of a partnership. This provision, at least on first reading, appears to be in direct conflict with the provisions of *Subsection (3) of 362.180*, however, a more careful analysis reveals what appears to be certain distinguishing factors.

It is submitted that use of the words ". . . a share of the profits . . ." in *Subsection (4)* presupposes the existence of some sort of definite, prearranged contract or agreement to divide profits with a certain percentage going to each member. In fact, the Kentucky Court of Appeals so held in *Smith* v. *Kelly, et. al.*, 465 SW2d 39 (1971). In *Smith*, the Kentucky Court held "A partnership is a contractual relationship and the intention to create it is necessary." *Smith at Page 40*. In *Smith*, there was no written agreement and Smith was given a "draw" each month plus a small amount from the profits at the end of each year. However, during the time Smith was associated with Kelly and one Galloway, Smith was held out to the public as a partner, contracted with a third party as a partner, filed partnership tax returns, so designated themselves as a partnership with the Kentucky Board of Accountancy and filed as a partnership with Smith as a partner.

Thus, based upon the above discussion, it becomes doubtful that a partnership under Kentucky law existed prior to the year 1973. There is no question that a partnership return (Form 1065) was filed for the years 1971

and 1972, however, as the Court well knows, this is only an informational return. Expenses of the law office were deducted on the partnership return for the years in question, however, this action produced no tax advantage or disadvantage as expenses could have been pro-rated and deducted on a "Schedule C" attached to a Form 1040 without any change in the tax liability at all.

CONCLUSION

It is not logical that after the Respondent (a criminal investigative agent) testified that he will use information he obtains from the Petitioner against him, that the Petitioner must, in obedience to an administrative Summons, bear witness against himself. Such a conclusion is repugnant to the individual's right to privacy and the Fifth Amendment's privilege against bearing witness against one's self.

Further, the conclusion of the Lower Court ignores the undisputed facts that Respondent initiated his first interview with the Petitioner by reading Petitioner his rights and then admonishing the Petitioner that he didn't have to talk to the Respondent at all.

If the Respondent concedes that Petitioner doesn't have to talk to the Respondent, what distinction is there between being compelled to talk and being compelled to furnish your personal written records?

The Fourth Amendment to the United States Constitution protects one against unreasonable search and seizures of his records and property, unless a proper Affidavit of probable cause to suspect a crime has been made before a Magistrate. No such Affidavit has been made or can be made, and hence, for the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be granted.

JAMES L. COBB
211 E. 4th Street
Covington, Kentucky 41011

WILLIAM C. OLDFIELD
211 E. 4th Street
Covington, Kentucky 41011

Counsel for Petitioner